

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED – NOVEMBER 30, 2006)

ESTATE OF CHRISTY J. PERRY

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VS.

C.A. NO. PC/03-4671

GREEN CARD, INC., d/b/a  
SICILIA'S PIZZA

**DECISION**

**SAVAGE, J.** This wrongful death action arises out of a fatal motor vehicle accident in which Andrew Zuromski, while he was delivering pizzas for Green Card, Inc., d/b/a Sicilia's Pizza, struck and killed Christy J. Perry who was changing a tire in the breakdown lane of Route 146 in North Providence, Rhode Island. The estate of the decedent, Christy J. Perry, as plaintiff, has brought suit against the defendant Green Card, Inc., d/b/a Sicilia's Pizza seeking to hold it vicariously for the alleged negligence of Andrew Zuromski. The defendant has moved for summary judgment, asserting that the tortfeasor, Andrew Zuromski, was not an employee, but an independent contractor for whose actions it cannot be held liable. It further moves for summary judgment on the issue of punitive damages. The plaintiff objects to the motion, contending that the defendant is vicariously liable for compensatory damages for its employee and is also liable for punitive damages based on its own conduct. For the reasons set forth in this Decision, this Court denies the defendant's motion for summary judgment in part and grants it in part.

**Facts and Travel of the Case**

On September 15, 2000, at approximately 8:30 p.m., Zuromski was in the process of delivering pizzas for the defendant when he struck and killed the decedent, Christy J. Perry. At the time, Perry was changing a tire in the breakdown lane of Route 146 in North Providence,

Rhode Island. The plaintiff filed the instant lawsuit alleging that the defendant is vicariously liable for Zuromski's negligence because he was an employee and/or agent of the defendant at the time of the collision. The plaintiff also seeks punitive damages.

The defendant counters that it cannot be held liable for Zuromski's actions because Zuromski was an independent contractor and that, even if this Court were to find that he was the defendant's employee or agent, punitive damages may not be imposed on a party found liable vicariously. The parties have submitted an agreed statement of facts for this Court to determine Zuromski's status vis-à-vis the defendant. This Court will now summarize those stipulated facts.

The defendant operates a pizza restaurant in Providence that provides dining and delivery services to its customers. See Agreed Statement of Facts at ¶ 1 & ¶ 26. The defendant advertises on an exterior sign the words: "Dine In/We Deliver." Id. at ¶ 26. Zuromski performed pizza deliveries for the defendant. Id. at ¶ 2. He was not paid on an hourly basis, but was compensated as follows: he would receive a one dollar delivery fee plus any tips he would receive from a customer, and he also would receive a 4.65% commission for every \$100.00 worth of food that he delivered. Id. at ¶¶ 3-4. Zuromski was not on the defendant's payroll and did not receive a W-2 statement from the defendant. Id. at ¶¶ 5-6. The defendant did not withhold any taxes from Zuromski's compensation and did not provide him with health insurance or any other kind of fringe benefits. Id. at ¶¶ 7-8.

Zuromski used his own vehicle to make deliveries and provided his own car insurance. Id. at ¶¶ 9-10. The defendant provided no training to Zuromski and placed no restrictions on how he chose to make his deliveries. Id. at ¶¶ 11-12. The defendant did not provide a uniform to Zuromski and did not place any advertisements or designations on his car. Id. at ¶¶ 13-14.

The defendant had a set procedure by which it would provide delivery services to its customers. A customer would telephone the defendant and place an order for food with the defendant's receptionist. Id. at ¶¶ 19-20. The receptionist would take down the particulars, including the customer's address, and then input the information into the restaurant's computer system. Id. The defendant then would prepare and cook the food. Id. at ¶ 21. The defendant would set the price for the food and then add a delivery fee of one dollar to the price of delivered food. Id. at ¶¶ 22 & 27. The defendant then would assign deliveries to particular delivery drivers. Id. at ¶ 23. When a delivery person arrived at the food delivery destination, the driver would identify himself or herself as being from the defendant's restaurant. Id. at ¶ 24. At no point did the defendant ever inform its customers that its drivers are either independent contractors or employees. Id. at ¶ 28.

Before allowing an individual to make deliveries, the defendant always asked to see the delivery driver's license and requested the delivery driver to provide proof of automobile insurance. Id. at ¶¶ 30-31. It never investigated, however, whether the driver's license was in good standing or whether the individual had a good or bad driving record. Id. at ¶¶ 32-33.

On any given day, Zuromski would log onto the computer upon arriving at the defendant's restaurant to make deliveries. Id. at ¶ 25. When Zuromski completed his deliveries for the night, he would cash out. Id. at ¶ 29.

At the time of the accident which is the subject of this case, Zuromski was delivering food on behalf of the defendant. Id. at ¶ 16. Prior to the accident, Zuromski had made other food deliveries for the defendant. Id. at ¶ 17. After the accident, Zuromski continued onward to make a delivery on the defendant's behalf. Id. at ¶ 18. He then returned to the defendant's premises to deliver the money he had collected for the food he had delivered. Id. at ¶ 19.

### **Standard of Review**

It is axiomatic that “[s]ummary judgment is a proceeding in which the proponent must demonstrate by affidavits, depositions, pleadings and other documentary matter . . . that he or she is entitled to judgment as a matter of law and that there are no genuine issues of material fact.” Palmisciano v. Burrillville Racing Association, 603 A.2d 317, 320 (R.I. 1992). During a summary judgment proceeding, “the court does not pass upon the weight or credibility of the evidence but must consider the affidavits and other pleadings in a light most favorable to the party opposing the motion.” Palmisciano, 603 A.2d at 320. Moreover, the court “must look for factual issues, not determine them. The [court’s] only function is to determine whether there are any issues involving material facts.” Steinberg v. State, 427 A.2d 338, 340 (R.I. 1981). The court’s purpose during the summary judgment procedure is always “issue finding, not issue determination.” Industrial National Bank v. Peloso, 397 A.2d 1312, 1313 (R.I. 1979). Thus, the only task of a motion justice in ruling on a summary judgment motion is to determine whether there is a genuine issue concerning any material fact. Id.

### **The Tortfeasor’s Relationship with the Defendant**

Defendant contends that the tortfeasor, Zuromski, was not an employee of its business; rather, it maintains, he was an independent contractor for whose actions it cannot be held liable. The plaintiff disagrees, contending that the defendant is vicariously liable because Zuromski was an employee.

One who employs an independent contractor generally will not be liable for the negligence of that contractor. Konar v. PFL Life Ins. Co., 840 A.2d 1115, 1117 (R.I. 2004); see also Ballet Fabrics, Inc. v. Four Dee Realty Co., Inc., 112 R.I. 612, 617, 314 A.2d 1, 4 (1974) (“[O]ne who engages an independent contractor to perform work is not liable for the negligent

acts of the contractor or his employees in performing th[at] work . . .”). Determining whether an employer-employee relationship exists between two parties is a mixed question of law and fact. See Di Orio v. R. L. Platter, Inc., 100 R.I. 117, 122, 211 a.2d 642, 645 (R.I. 1965). As the parties here submitted an agreed statement of facts, there are no genuine issues of material fact; consequently, this Court will now consider whether Zuromski was an employee or an independent contractor of the defendant as a matter of law.

In making such a determination, “the test [as to] whether a person is an independent contractor is based on the employer’s right or power to exercise control over the method and means of performing the work and not merely the exercise of actual control.” Absi v. State Dep’t of Admin., 785 A.2d 554, 556 (R.I. 2001) (quoting Pasetti v. Brusa, 81 R.I. 88, 91, 98 A.2d 833, 834 (1953)). An independent contractor is defined as one who contracts to do a piece of work according to his or her own methods, and without being subject to the control of his or her employer except as to the result of his work. See Lake v. Bennett, 41 R.I. 154, 156 (R.I. 1918) (holding that the negligent act of an individual relocating a steam boiler to the side of the road after a truck carrying it broke down could not be the basis upon which to hold the company that hired him vicariously liable because there was “no evidence that the route over which the boiler was to be carried to its destination by [the individual] or the means or method by which such transportation was to be effected . . . was in any way suggested by the [company]”).

In Tapager v. Birmingham, 75 F.Supp. 375, 384 (N.D. Iowa 1948), the United States District Court for the Northern District of Iowa determined that members of the defendant’s traveling furniture sales force were employees and not independent contractors for purposes of

determining their entitlement to social security and federal unemployment tax.<sup>1</sup> The facts in that case were not dissimilar from the facts in this case: the sales force sold the plaintiff's product at the customers' homes; they did not set the price; they were paid on a commission basis; they supplied their own vehicles; and they were free to set their own routes.

Another very persuasive case is that of Toyota Motor Sales U.S.A., Inc. v. The Superior Court of Los Angeles, 220 Cal. App. 3d 864 (1990), in which the court found a pizza delivery driver to be an independent contractor. The facts in that case are almost identical to those in this case except for one notable difference; in that case, a pizza delivery driver was required to sign a detailed contract with the owner of the pizza store specifically acknowledging his or her status as an independent contractor. Id. at 872. Applying Restatement (Second) of Agency § 220 (1958) to the facts in that case, the Court of Appeal of California, Second Appellate District, Division Three, reversed the lower court's finding that the driver was an independent contractor; instead, it held that, notwithstanding his written contract to the contrary, he was an employee. Id. at 878; see also Estrada v. FedEx Ground Package Systems, Inc., C.A. No. BC 210130 (Los Angeles Super. Ct. July 26, 2003) (Schwab, J.) (finding Federal Express drivers to be employees rather than independent contractors notwithstanding written contract between drivers and company that characterized drivers as independent contractors).

The Restatement (Second) Agency lists factors that are relevant to such inquiries as:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;

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<sup>1</sup> It is interesting to note that under the Rhode Island Employment Security Act, "[t]he determination of independent contractor or employee status for purposes of chapters 42-44 of this title shall be the same as those factors used by the Internal Revenue Service in its code and regulations." R.I. Gen. Laws § 28-42-7.

- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

Restatement (Second) Agency § 220 (1958).<sup>2</sup> Another factor that can be considered is the opportunity for profit and loss from the activities. See Tapager, 75 F.Supp. at 384 (noting that “employees are those who as a matter of economic reality are dependent upon the business to which they render service”). Mindful of this authority, this Court will apply the precepts outlined in the Restatement to the undisputed facts of this case to resolve the legal question presented of whether Zuromski was an employee of the defendant or an independent contractor.

### **1. Extent of Control by Defendant Over Details of Zuromski’s Work**

The first factor to be considered is the extent or degree of control that the defendant had over the details of Zuromski’s work. When applying the factors enumerated in the Restatement, it is important to remember that:

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<sup>2</sup> See also Camacho v. P.R. Ports Auth., 369 F.3d 570, 574 (1st Cir. 2004) (applying a similar list of factors in an age discrimination case to determine the relationship between a pilot and the Port Authority). In that case, the First Circuit Court of Appeals listed the factors to be considered as:

[T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Camacho, 369 F.3d at 574 (quoting Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989)).

employer control is clearly the most important and the others merely constitute secondary elements. Furthermore, it is not the control actually exercised, but that which may be exercised which is determinative. One of the means of ascertaining whether or not this right to control exists is the determination of whether or not, if instructions were given, they would have to be obeyed. The real test has been said to be whether the employee was subject to the employer's orders and control and was liable to be discharged for disobedience or misconduct; and the fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it. Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so. Indeed, the unlimited right to discharge at will and without cause has been stressed by a number of cases as a strong factor demonstrating employment.

Toyota Motor Sales U.S.A., Inc., 220 Cal. App. 3d at 875 (internal citations and quotations omitted). Thus, the “power to deprive a salesman totally or substantially of a necessary aid to selling activity without the [defendant] being in breach of any obligation to the salesman so deprived . . . would seem to be incompatible with the freedom of control enjoyed by an independent contractor.” Tapager, 75 F. Supp. at 386.

The defendant's “degree of control” over the details of Zuromski's work “fits into the total scheme of the ‘economic reality’ test, as one tending, as the degree of the right to control over one rendering service to another becomes higher, to establish that the one performing that service is an employee, and, conversely, as the degree of control becomes less, tending to establish the individual's status as an independent contractor.” Id. at 385. Furthermore,

[t]he importance of the power of control in the establishment of tort liability of an employer is based upon the fact that the employee is generally obliged as a matter of economic expediency to follow the instructions of his employer as to the negligent or prudent manner in which he carries on activities in the course of his employment, even though in fact the employee may not be subject to actual physical control. In theory, at least, this situation gives birth to a sound basis for employer liability, and the presence

or absence of the power of control is generally of paramount importance in the establishing of that liability.

Id.

In Toyota Motor Sales U.S.A., Inc., the court discussed the issue of control and stated that the defendant in that pizza delivery case:

directed and controlled (1) the number, nature and type of pizzas to be delivered, (2) the time when such deliveries would take place, (3) the persons and locations to whom they would be delivered and (4) the price to be charged for each pizza and the total amount of money to be collected from each customer. In short, [the defendant] determined what would be delivered, when and to whom and what price would be charged. What portion of [the tortfeasor's] work was left to his discretion and not subject to [the defendant's] control? Did it include anything more than the route [the tortfeasor] would take to a customer's home or how fast he would drive? Such factors generally have been considered to be simply a freedom inherent in the nature of the work and not determinative of the employment relation. Moreover, it is at least arguable that [the defendant] had the right to control this aspect of [the tortfeasor's] work as well. It would be [the defendant's] obvious purpose and desire, and thus clearly part of [the tortfeasor's] responsibility, to get the fresh warm pizza to the customer as soon as possible. Indeed, it will doubtless be argued at trial that [the tortfeasor's] preoccupation with the necessity for prompt delivery contributed in some manner to the accident which allegedly caused plaintiff's injuries.

220 Cal. App. 3d at 875-76 (internal quotations omitted). Additionally, "the fact that the control exercised by the [defendant] was somewhat loose in character did not negative the right and power of the [defendant] to exercise stricter control." Tapager, 75 F.Supp. at 385 (observing that the only items of equipment needed by the traveling sales force were supplied by the plaintiff; the salespeople had no authority to change the price of the items that they sold; they did not appear to have the authority to hire assistants; and they had no power to change the amount of commission or the method of remuneration).

Likewise in the present case, this Court finds that the defendant possessed control over Zuromski because it arranged for him to make his deliveries outside the pizza restaurant. This arrangement required Zuromski to return after each delivery and to receive instructions concerning his next delivery. It is undisputed that the defendant received the food orders, determined the name of the customer and the location for delivery, prepared and cooked the food, set its price, added a delivery charge and then assigned the delivery to a particular delivery driver. It made sure that its drivers were licensed and had automobile insurance. While there is no evidence that the defendant established the routes its drivers were to take to make the deliveries, dictated the speed with which the deliveries were to be made or ensured their ability to drive responsibly, it is at least arguable that it had the right to control these aspects of the drivers' work. Furthermore, the fact that the defendant had the power to assign the deliveries suggests that it easily could have terminated a relationship with a driver by simply not assigning any food deliveries to that person.

Consequently, this Court finds that Zuromski was completely dependent upon the defendant to provide him with the food that he needed to make his deliveries and to earn his compensation. Thus, the control factor in this case weighs significantly in favor of finding an employer-employee relationship.

## **2. Worker in Distinct Occupation or Business**

The defendant's exterior sign advertised "Dine In/We Deliver," and employees of the defendant took delivery orders. As noted above, the defendant prepared and cooked the food, set its price, added a delivery charge and assigned the delivery to particular delivery drivers. Accordingly, this Court finds that the delivery operation was just one aspect or extension of the

defendant's overall business. This renders delivery driver Zuromski more like an employee than an independent contractor.

### **3. Local Custom**

Neither party presented any evidence as to whether food delivery service typically is performed by either independent contractors or employees. See Isenberg v. California Employment Stabilization Commission, 180 P.2d 11, 15 (1947) (discussing evidence submitted as to “the customs and practices of the owners of race horses and the trainers generally in employing jockeys, and their control over the jockeys’ activities in riding the horses[,]” in order to determine whether the plaintiff was an employee or an independent contractor). As there is no evidence of the customs and practices of pizza companies in general with respect to the hiring of delivery drivers, this factor does not weigh in favor of either characterization of the relationship.

### **4. Skill Required in the Particular Occupation**

This Court next must address the level of skill that Zuromski needed to perform his duties. As stated by the court in Tapager:

The factor of skill required of the individual performing the services is frequently of importance in regard to the question of an independent contractor or employee status. The greater the skill required to perform a given function, the less practical likelihood there will be that the individual for whom the skilled service is performed will be able to control the individual performing the function as to the means by which it is done, and the greater will be the tendency to find that the individual from his possession of tools, equipment, or knowledge used in the skilled operation will be engaged in an independent business. This is, of course, not a universal situation. Many types of employment exist which involve the highest type of skill on the part of a person rendering a service in an employee capacity. The factor of skill must, as must all the other factors, be examined with a view to all other facts and circumstances of the particular case.

Tapager, 75 F. Supp. at 385-86.

In this case, the only skill required of Zuromski was to be able to drive a motor vehicle and pick up and deliver pizzas. The defendant required potential drivers to possess legal driving privileges at the outset, as evidenced by the defendant ensuring that each driver possessed a driver's license and insurance before allowing him or her to make deliveries for it. The defendant did not provide any training for its drivers. Because there was no significant, task-specific or specialized education or training involved in picking up pizzas for delivery to a given address, driving them there and delivering them that would tend to establish Zuromski as being independent of the defendant's business, or engaged in his own business, this factor weighs in favor of an employer-employee relationship.

#### **5. Supplier of Instrumentalities of Work**

This Court next must consider the extent to which the defendant supplies to its drivers the instrumentalities, tools or place of the work. This factor is significant, as noted by the court in Tapager, because:

[a] substantial investment in the facilities used by one in performing services for another is indicative that the one performing the services is engaged in an independent business and is not the employee of the one for whom the services are performed. Such investment is frequently represented by ownership of or an interest in an establishment or in equipment distinct from and unrelated directly to the business of the person for whom the services are rendered. Where a person has a substantial investment in the facilities used in rendering some service, the tendency is toward the finding that such a person has assumed the status of an independent contractor and away from the finding that that person has integrated his investment solely into the business of those for whom he renders service.

Id. 75 F. Supp. at 387.

The defendant places much emphasis on what it did not supply, such as uniforms or advertisements for its drivers' vehicles, as being indicative of Zuromski's status as an

independent contractor. It also stresses the fact that Zuromski furnished his own vehicle and insurance. There is no suggestion, however, that he purchased the vehicle and insurance for the sole purpose of delivering pizza or that he did not use the vehicle for personal use. Furthermore, the furnishing of a car and insurance “would at most be a ‘secondary element’ and, without more, worthy of little weight.” Toyota Motor Sales U.S.A., Inc., 220 Cal. App. 3d at 876.

The defendant was in the business of selling food and Zuromski delivered that food. His duties were fully integrated into the defendant’s business. Thus, as succinctly stated in Tapager: “[i]t would seem as a matter of economic reality that [Zuromski] did not have such an investment in unintegrated facilities as would warrant the inference that [he was an] independent contractor[] . . . .” Tapager, 75 F. Supp. at 387. Accordingly, this factor weighs in favor of finding an employer-employee relationship.

## **6. Method of Payment**

This Court next will examine the defendant’s method of paying its drivers. The agreed statement of facts indicates that the defendant paid Zuromski both by the job (a one dollar delivery fee) as well as by a 4.65% commission for every \$100 worth of food that he delivered. The defendant did not list Zuromski on its payroll, provide him with a W-2 form, withhold taxes, or provide him with health insurance or any other kind of fringe benefits.

While Zuromski earned a per-delivery fee and a commission, however, he had no opportunity for personal profit or loss in any real sense, as would be expected for an individual operating his or her own independent business. See id. 75 F. Supp. at 387 (“Where a person has no investment involved, he is not affected by the factor of risk of profit or loss from his [or her] decisions in the continuous or recurrent rendering of a service as he would were he operating an independent business.”). He lacked that opportunity because “decisions made in the ordinary

course of activity by those having an employment status do not involve a personal risk of profit or loss.” Id.

The defendant contends that the payment of a commission supports its assertion that Zuromski was an independent contractor; however, commission payments are “equally consistent with employee status.” Toyota Motor Sales U.S.A., Inc., 220 Cal. App. 3d at 877. Furthermore, although the defendant did not list Zuromski on its payroll, provide him with a W-2 form, withhold taxes, or provide him with health insurance or any other kind of fringe benefits, these facts, standing alone, do not mean that Zuromski was an independent contractor. Such facts “are merely the legal consequences of an independent contractor status [but] not a means of proving it.” Id. (observing that “an employer cannot change the status of an employee to one of independent contractor by illegally requiring him to assume burdens which the law imposes directly on the employer”). In view of these considerations, this factor weighs in favor of finding an employer-employee relationship.

#### **7. Work as Part of Regular Business of the Defendant**

This Court next inquires whether the work of pizza delivery drivers is part of the regular business of the defendant. The stipulated facts reveal that defendant is engaged in the business of selling food. At the time in question, the defendant provided that food either directly to the customers in the restaurant or by way of delivery to their properties. Indeed, the sign outside its restaurant advertises that it provides a delivery service. Delivery service, therefore, was a regular and crucial part of the defendant’s business. Consequently, this factor weighs in favor of finding an employer-employee relationship.

## **8. Intent of the Parties**

The intent of the parties in creating or not creating an employer-employee relationship may be considered by the court in determining whether such a relationship existed. “For either an express or implied contract, a litigant must prove mutual assent or a meeting of the minds between the parties.” See Opella v. Opella, 896 A.2d 714, 720 (R.I. 2006) (quoting Mills v. Rhode Island Hospital, 828 A.2d 526, 528 (R.I. 2003) (mem.) (internal quotations omitted)); see also J. Koury Steel Erectors, Inc. of Mass. v. San-Vel Concrete Corp., 120 R.I. 360, 365, 387 A.2d 694, 697 (1978) (“To establish either an express or an implied contract, one must prove mutual agreement and intent to promise.”).

Although its drivers usually identified themselves as being from the defendant’s restaurant when they made their deliveries, the defendant actually never informed its customers of the status of its drivers. It is not the subjective intent of the parties, however, that controls. See Filippi v. Filippi, 818 A.2d 608, 623-24 (R.I. 2003) (“Objective intent is determined by the ‘external interpretation of the party’s or parties’ intent as manifested by action.”) (quoting Smith v. Boyd, 553 A.2d 131, 133 (R.I. 1989)). Neither party has presented any evidence as to the existence of any express or implied contract that might indicate the intent of the parties when they entered into their relationship. Consequently, this factor does not weigh in favor of characterizing that relationship as either one of employer-employee or of independent contractor.

## **9. Whether the Defendant is in Business**

It is undisputed that the defendant is a corporation whose only business is that of selling food, both on the premises and by way of delivery. Thus, delivery drivers are both necessary and incident to providing this service to its customers. See In re Critical Care Support Services, Inc., 138 B.R. 378, 381 (1992) (holding that because the debtor’s only business was to provide critical

care nurses and where the debtor paid those nurses directly, they were necessary and incident to the business and were employees for purposes of federal withholding taxes and federal insurance contributions). Considering that delivery drivers are essential to the defendant's delivery business, this factor weighs in favor of finding an employer-employee relationship.

#### **10. Length of Employment**

Finally, this Court must consider the length of Zuromski's employment in determining his status as an employee or as an independent contractor. In the accompanying memorandum to its motion for summary judgment, the defendant relied upon facts taken from attached affidavits to support its assertion that Zuromski was an independent contractor. Because the parties subsequently submitted an agreed statement of facts, however, this Court will not consider these factual assertions.

The agreed statement of facts does not indicate how long Zuromski worked for the defendant; however, it does appear that his work may have been casual. See Columbia School Supply v. Lewis, 115 N.E. 103, 104 (Ind. App. 1916) (holding that the determination of whether a casual laborer is an employee or an independent contractor is a mixed question of law and fact). Casual employment "has been described as that which is 'irregular, unpredictable, sporadic, and brief in nature.'" DiRaimo v. DiRaimo, 117 R.I. 703, 708, 370 A.2d 1284, 1287 (1977) (internal citation omitted). In considering whether employment is casual, "[t]he duration, predictability and regularity of recurrence" should be taken into account. Id. Likewise, "[i]t is also helpful to note whether the services rendered are necessary to the conduct and furtherance of the business." Id.

Although a casual laborer may either be an employee or an independent contractor, because the agreed statement of facts does not contain any information regarding how often

Zuromski worked each week, or for how long he had been working for the defendant, this factor does not weigh in favor of a finding of either employer-employee relationship or independent contractor relationship.

### **Weighing These Factors to Find an Employer-Employee Relationship**

After due consideration of the parties' stipulated facts and the arguments advanced at oral argument and in the parties' memoranda on this issue, this Court finds that defendant's motion for summary judgment, to the extent premised on the argument that the tortfeasor, Zuromski, was not an employee but an independent contractor for whose actions it cannot be held liable, must be denied. The defendant clearly had control over Zuromski, as one would expect in an employer-employee relationship, and none of the secondary elements described above weigh in favor of an independent contractor relationship. Mindful that no one factor, standing alone, is outcome determinative, and after weighing of all of the incidents of the relationship between the defendant and its pizza delivery drivers generally, and its relationship with Zuromski in particular, this Court finds that these factors weigh in favor of an employer-employee relationship.<sup>3</sup>

Moreover, this conclusion comports with the policy justifications for holding employers, such as the defendant, vicariously liable for the negligence of their employees occurring in the scope of their employment. As stated by the court in Toyota Motor Sales U.S.A., Inc.:

Certainly, such a result would be entirely consistent with the rationale for imposing respondeat superior liability. An employer, quite apart from the issue of control, should be liable for those risks which are inherent in, or created by, the operation of the enterprise from which [it] intends to profit. Here, the actual occurrence [i.e., the injury to plaintiff as a result of [the tortfeasor's

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<sup>3</sup> Considering that the agreed statement of facts did not provide any evidence of local custom, intent of the parties, or length of employment, these secondary factors do not weigh in favor of either characterization of the relationship. Moreover, the nature of Zuromski's employment, even if deemed casual, would not be enough to tip the balance away from finding an employer-employee relationship.

negligence] was a reasonably foreseeable consequence of [the defendant's] engaging in a business activity involving multiple deliveries of temperature-sensitive food products. This was a risk of [the defendant's] enterprise and [it], rather than the innocent plaintiff, should be required to bear it. This result is grounded upon a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.

220 Cal. App. 3<sup>rd</sup> at 878 n. 10 (internal quotations and citations omitted).

### **Punitive Damages**

The defendant contends that should this Court find Zuromski to have been its employee, punitive damages may not be awarded vicariously against it because it did not participate in the alleged wrongful act of its employee. The plaintiff asserts that the automobile accident was a foreseeable risk and that the defendant failed to take precautions against that foreseeable risk. Specifically, the plaintiff avers that the defendant's failure to check Zuromski's motor vehicle record and criminal background constituted reckless conduct warranting an award of punitive damages, even though it has presented no evidence as to what such a search would have revealed and whether it would have prevented the accident in question.

The determination as to whether punitive damages are appropriate is a question of law. Cady v. IMC Mortg. Co., 862 A.2d 202, 219 (R.I. 2004) (citing Mark v. Congregation Mishkon Tefiloh, 745 A.2d 777, 779 (R.I. 2000)). A party seeking punitive damages must produce "evidence of such willfulness, recklessness or wickedness, on the part of the party at fault, as amount[s] to criminality that should be punished." Fenwick v. Oberman, 847 A.2d 852, 855-56 (R.I. 2004) (per curiam) (quoting Bourque v. Stop and Shop Companies, Inc., 814 A.2d 320, 326 (R.I. 2003)). In Rhode Island, "our rule would not permit a jury to award punitive damages on a respondeat-superior theory." Palmisano v. Toth, 624 A.2d 314, 321 (R.I. 1993). As stated by the Rhode Island Supreme Court, "[i]t has long been the law in this state that punitive or

exemplary damages will not be allowed in situations in which a ‘principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him particeps criminis of his agent’s act.’” AAA Pool Service & Supply, Inc. v. Aetna Cas. & Sur. Co., 479 A.2d 112, 116 (R.I. 1984) (quoting Hagan v. Providence & Worcester R.R. Co., 3 R.I. 88, 91 (1854)). Furthermore “when the proof does not implicate the principal and when the principal neither expressly nor impliedly authorized or ratified the act, ‘it is quite enough, that [the principal] shall be liable in compensatory damages . . . .’” Id.

In the instant case, the plaintiff contends that Zuromski’s conduct was egregious and reckless because he left the scene after he struck the decedent with his vehicle. The plaintiff further asserts that a collision was foreseeable because the defendant did not perform driving and criminal background checks of its drivers. Assuming, without deciding, that Zuromski’s conduct arose to the level of criminality, there is no evidence to suggest that the defendant participated in or expressly or impliedly authorized Zuromski’s conduct, much less engaged in any conduct itself that rose to the requisite level of criminality. Consequently, this Court finds that defendant’s motion for summary judgment on the issue of punitive damages should be granted.

### **Conclusion**

After due consideration of the parties’ agreed statement of facts and the arguments advanced at oral argument and in the parties’ memoranda, this Court finds, as a matter of law, that Zuromski was the defendant’s employee at the time of the collision; consequently, the defendant’s motion for summary judgment with respect to the issue of liability is denied. This Court finds, however, that the defendant cannot be held liable, as a matter of law, for punitive damages. Accordingly, the defendant’s motion for summary judgment as to the issue of punitive damages is granted.

Counsel are directed to confer and to submit to this Court forthwith for entry an agreed upon form of order and judgment that are consistent this Decision.